# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

TRI-PAK MACHINERY, INC.

and

Case 16-CA-24112

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1015, a/w INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO

Roberto Perez, Esq., for the General Counsel. Glenn Jarvis, Esq., for the Respondent. Mr. Michael Murphy, for the Charging Party.

#### **BENCH DECISION**

#### Statement of the Case

George Carson II, Administrative Law Judge: This case was tried in Harlingen, Texas, on July 11, 2005. The charge was filed on February 10, 2005. The complaint issued on May 24, 2005. The complaint alleges that the Respondent, Tri-Pak Machinery, Inc., has, since December 20, unlawfully failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of employees in the Unit in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.<sup>2</sup> At the conclusion of the hearing, after hearing oral argument, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

Consistent with the allegations of the complaint, I found that the Respondent did unlawfully fail and refuse to recognize and bargain with the Union as the exclusive collective bargaining representative of employees in the Unit. As discussed in my decision, I found that the Respondent had notice that the International Union had chartered a new local, Local 1015, and that the Respondent thereafter dealt with that local as the Union representing its employees. At the hearing, the Respondent argued that the Union did not represent a majority of unit employees, but the Respondent presented no objective evidence establishing loss of majority status. Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001). As pointed out in Eden Gardens Nursing Home, 339 NLRB 71, 72 (2003), regarding dues deduction authorizations, the "employees may prefer to pay their dues only at convenient times or in person, or may even be 'free riders' who desire and accept union representation without joining the union and paying dues." As discussed in the Bench Decision, the Respondent's refusal to

<sup>&</sup>lt;sup>1</sup> All dates are in 2004 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> The appropriate unit is: All production and maintenance employees, including shipping clerk(s), who are employed by the Company in Harlingen, Cameron County, Texas; but excluding all office clerical employees, professional employees (including salesmen), draftsmen, guards and supervisors as defined in the Act.

recognize and bargain was predicated upon its belated challenge to the chartering of the new local union, the Union with which it had dealt for the previous two years. As established by the case authority cited in my decision, and as recently reaffirmed by the Board in *Alpha Associates*, 344 NLRB No. 95, slip op. at 1-2 and fn. 4 (2005), such belated challenges are barred by Section 10(b) of the Act.

The Respondent, Tri-Pak Machinery, Inc., is a Texas corporation engaged in the manufacture and retail sale of parts and machinery used in the processing of agricultural products. The Respondent admits that it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of Texas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Electrical Workers, Local Union 1015, a/w International Brotherhood of Electrical Workers, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

I certify the accuracy of the portion of the transcript that sets out my decision, attached hereto as Appendix A, page 219, line 11, through page 226, line 13.3

### Remedy

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Having found that the Respondent has engaged in unfair labor practices by refusing to recognize and bargain with the Union, I find that it must cease and desist from withholding recognition for the Union, that it must recognize and bargain with the Union, and that it must post an appropriate notice.<sup>4</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

35 ORDER

The Respondent, Tri-Pak Machinery, Inc., Harlingen, Texas, its officers, agents, successors, and assigns, shall:

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<sup>&</sup>lt;sup>3</sup> Appendix A has been corrected. The corrections are reflected in Appendix C. Appendix C does not reflect the corrected capitalization of the word "Company" when referring to the Respondent Tri-Pak or the word "Union" when referring to the Charging Party Local 1015. Case names have been italicized consistent with Board format.

<sup>&</sup>lt;sup>4</sup> The Notice to Employees shall be in both English and Spanish insofar as a significant number of unit employees are native speakers of Spanish rather than English.

<sup>&</sup>lt;sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

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- (a) Refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local Union 1015, a/w International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive collective bargaining representative of its production and maintenance employees, including shipping clerk(s), in Harlingen, Cameron County, Texas.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Recognize and upon request bargain with International Brotherhood of Electrical Workers, Local Union 1015, a/w International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive collective bargaining representative of its production and maintenance employees, including shipping clerk(s), in Harlingen, Cameron County, Texas, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.
- (b) Within 14 days after service by the Region, post at its facility in Harlingen, Texas, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 16 in both English and Spanish, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places
  where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 2004.
  - (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 8, 2005.

40 George Carson II
Administrative Law Judge

<sup>6</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

#### APPENDIX A

#### **BENCH DECISION**

#### 219

- 11 The complaint in relevant part, paragraph 14, alleges that
- 12 since on or about December 20, the Respondent has failed and
- 13 refused to recognize and bargain with the Union as the exclusive
- 14 collective-bargaining representative of the Unit. The Union,
- 15 for the purposes of the complaint, is the new local, 1015.
- 16 There is no issue but that a valid collective-bargaining
- 17 agreement between the Company and Local 278 was entered into on
- 18 February 16, 2002, and it
- 19 expired at midnight on February 15, 2005,
- 20 insofar as it indicates that it is for three years.
- 21 There is virtually no testimonial conflict with regard to
- 22 any of the facts before me. In the summer of 2002, Organizer Fernando
- 23 Huerta, with at least two others, he testified to three,
- 24 and that's actually uncontradicted, although the third individual with him
- 25 didn't leave his business card, met with Mr. David Fitzgerald,

#### 220

- 1 President of the Company, and spoke with him informally with
- 2 regard to the union's intention of chartering a new local which
- 3 would have offices in Weslaco, Texas, some 20 to 30 minutes from
- 4 Harlingen, Texas, rather than the two hours from Corpus Christi, Texas, which
- 5 is where the Local 278 was headquartered.
- 6, 7
- 8 On September 26, 2002, Jonathan Gardner,

	9 International Vice President, wrote to Mr. David Fitzgerald,
	10 President of Tri-Pak, advising him that a new local, to wit
5	11 1015, had been chartered, that effective immediately Local 1015
	12 would assume the representational responsibility for bargaining for
40	13 unit employees at Tri-Pak in place of Local 278. The letter
10	14 gives the address, and indicates that Local 1015 "looks forward
	15 to working with you and developing a mutually beneficial
15	16 relationship. If you have any questions, feel free to contact
	17 us."
20	18 I appreciate from the testimony that Mr. Fitzgerald did
20	19 not necessarily internalize the communication which he
	20 acknowledges receiving. By the same token, I have difficulty
25	21 determining how there was any question but that Local 278 was
	22 out of the picture and Local 1015 was in the picture in view of
30	23 the fact that he began dealing with a new local president, Mr. Jesse
30	24 Sanchez.
	25 All correspondence between the parties relative to
35	221
	1 barbecues and coming onto the premises and whatever were between
40	2 the Company and Local 1015 at the Weslaco location. Dues ceased to be
	3 sent to Local 278 in Corpus Christi as of the first deduction in 2003,
	4 admittedly two or three months late, and were sent to Weslaco. When the address
45	5 for Local 1015 changed from 607 International Boulevard in
	6 Weslaco to 3102 East Business Highway 83, Suite 1, Weslaco,
	7 that's where the communications from the Company were sent.
	8 I am mindful that after the Company's receipt of Respondent's

	9 Exhibits 11 and 12, documents dated respectively 8/26/04 and
	10 9/7/04, that dues were not being deducted for any employee.
5	11 However, as Board case law establishes, the absence of receipt
	12 of dues or check-off authorizations does not constitute
10	13 objective evidence of disaffection with a union, and there's no
10	14 evidence before me that the Company had any objective evidence
	15 that a majority of the employees in the Unit no longer desired
15	16 representation. More to the point, there was no claim when the
	17 Union made its initial demand for recognition that a majority of
20	18 the employees did not desire representation by the Union or that
20	19 the Company had objective evidence that a majority of the
	20 employees no longer wished to be represented by the Union.
25	On November 11, Joint Exhibit 9 reflects that, in
	22 preparation for upcoming contract negotiations, the Union
30	23 requested employees' names, addresses, and telephone numbers. By
50	24 fax, on Tri-Pak letterhead, all of the requested information,
	25 excluding telephone numbers, was provided to IBEW Local 1015; that is,
35	222
	1 the Company was dealing with Local 1015.
40	2 On December 13, following up on the request for
	3 information relating to upcoming contract negotiations, the
	4 Union sent a proposal relating to changes in the current
45	5 agreement, which would be the substance of the new agreement.
	6 By letter dated December 20, Counsel for the Company raised an issue,
	7 and the issue that was raised in that letter had nothing
	8 to do whatsoever with regard to majority support by employees

	9 represented by the Union, but
	10 related to the fact that Local 278 was certified.
5	11 The letter requested that the Union forward documentation establishing that
	12 Local 1015 is the legally authorized successor. Information, Joint Exhibit 14, in
	13 response to that request was sent.
10	14, 15, 16, 17
	18 On January 5, 2005, the Company responded through its attorney, thanking
15	19 the Union for the documents that were disclosed and confirming
	20 that Local Union 1015 had been chartered as a new local in
20	21 Weslaco. That, of course, was old news, because that had been stated
20	22 in the September letter in 2002.
	The Company letter of January 5, 2005, Joint Exhibit Number 15,
25	24 reflects that the Company wanted
	25 documentation regarding involvement of the company's employees
20	223
30	1 in the change of their collective-bargaining representative and
	2 that the Company believed that they should have been involved
35	3 in that change.
	4 On February 7, after conversation and an exchange
40	5 of some case authority cited by the Union, Counsel for the Company indicates that
	6 he's reviewed the case authority sent and still believes that
	7 there's a question regarding whether the company's employees
45	8 selected Local 1015 in accordance with various cases cited
	9 therein and notes what he perceives as a legal conundrum of
	10 refusing to enter into a collective-bargaining agreement with a
	11 union that represents a majority of employees may constitute a

12 violation of Section 8(a)(5) versus execution and negotiation with a union 13 that does not represent a majority of the company's employees, 14 violating Section 8(a)(1) or unlawful domination and assistance under 8(a)(2), 5 15 and concludes with, "Should you have further evidence as to the 16 status of Local 278 or participation by the company's employees 10 17 in the change of their collective-bargaining representative, 18 please forward," which is to say that as late as February 7 of 19 2005, there was no claim that the Company had a good faith doubt 15 20 or objective evidence with regard to a desire by a majority of 21 unit employees not to be represented by the union. 20 22 Rather, the issue as framed in the correspondence was the 23 representative status of Local 1015. I appreciate and 24 understand that Mr. Fitzgerald may not have been fully aware of 25 25 the possibility of a lawful refusal to recognize if it had been 224 30 1 timely raised, but the short answer to that question is: He 2 didn't raise it; the Company dealt with 1015 for well over two 3 years, and even submitted information to Local 1015 in 35 4 anticipation of bargaining for a successor contract. 5 General Counsel, in his oral argument, has cited to me several cases. 40 6 RPC, Inc., 311 NLRB 232 (1993) involved a similar issue. Board precedent 7 establishes that, under 10(b), an unfair labor practice complaint may 8 not be issued relative to events that occurred 45 9 more than six months preceding the 10 filing of the charge and that, consistent with the Supreme Court 11 decision in Local Lodge 424, IAM (Bryan Manufacturing Company)

	12 v. NLRB, 362 U.S. 411 (1960), a respondent may not defend	
	13 against a refusal-to-bargain allegation on the ground that the	
5	14 underlying original recognition of the union was unlawful if it	
	15 occurred more than six months before any charges had been filed	
10	16 in the proceeding raising the issue.	
10	17 In Route 22 Toyota, 337 NLRB 84 (2001), which was relatively complicated, the	
	18 Respondent recognized and signed a contract with another local	
15	19 and then was attempting to back out of it when the predecessor	
	20 union sought to reassert its bargaining rights. The Board held that the company's	
20	21 action came too late. The Respondent was not privileged to withdraw	
20	22 recognition from Local 747, and the Board	
	23 held that the Judge erred in	
25	24 finding that Local Union 148 presented a valid competing claim	
	25 for recognition that should be resolved by an election.	
30	225	
30	1, 2	
	What it comes down to, as I see it, is under the	
35	4 principles stated in RPC, Inc., 311 NLRB 232, at 234, the Board	
	5 has historically and continuously held that a respondent's	
40	6 challenge to a merger or an affiliation, and by extension the	
	7 creation and issuance of a charter to a new	
	8 local, if the respondent had knowledge of that within what would	
45	9 have been the 10(b) period for that event and does not challenge	
	10 it, it cannot raise it at a later time, and it certainly cannot	
	11 raise it more than two years after the event occurs.	
	12 In RPC, the company argued with regard to defending	

	against the General Counsel's equitable estoppel position, that
	14 10(b) was not triggered because it did not have knowledge of all
5	15 of the facts relating to the affiliation, and the Board stated,
	16 "To be sure, the 10(b) period commences only when a party has
10	17 clear and unequivocal notice of the action giving rise to an
10	18 alleged violation of the Act, but it is knowledge of the act or
	19 the event to be challenged that triggers 10(b). There is no
15	20 requirement that an affected party have knowledge of all the
	21 circumstances leading up to or surrounding the event in issue."
20	And relative to that, in this case, I can find nothing
20	23 clearer than the letter sent by the Union on
	24, 25
25	226
	1 September 26, 2002: "The IBEW has chartered a new IBEW local,
20	2 1015, to represent the workers in the Rio Grande area.
30	3 Effective immediately Local 1015 will assume the
	4 representational responsibility for bargaining unit employees in
35	5 place of Local 278."
	6 As my summary of the facts and the law indicates, I have
40	7 no basis for finding anything other than that the Company was on
+0	8 notice. The Company dealt with the new Union. Regardless of
	9 the propriety of the chartering and the absence of participation
45	10 by any Tri-Pak employees with regard to it, the refusal to
	11 bargain cannot be excused, and I will issue an order certifying
	12 this decision and setting out the obligation of the Respondent.
	13 This ends the bench decision.

#### APPENDIX B

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local Union 1015, a/w International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive collective bargaining representative of our production and maintenance employees, including shipping clerk(s), in Harlingen, Cameron County, Texas, and WE WILL recognize and upon request bargain with the Union with respect to your rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

		TRI-PAK MACHINERY, INC.  (Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

819 Taylor Street, Fort Worth TX 76102-6178 (817) 978–2921, Hours: 8:15 a.m. to 4:45 p.m.

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978–0678

## APPENDIX C

Page	Line	Delete	Insert
219	5		Unit.
	17	in	on
	18	February—16 <sup>th</sup> of February 19—	February 16, 2002, and it
		I'm sorry—2002. And it	
	19	either, I'm assuming	at
	19	February 15, of 2005	February 15, 2005,
	20	that is	that it is
	22	Mr.	Organizer
	23	others—and he testified to three,	others, he testified to three
	24	fourth one	third individual with him
	25		,
220	1	president of the company	President of the Company
	4	Harlingen rather than the two	Harlingen, Texas, rather than the two
		hours from Corpus Christi,	hours from Corpus Christi, Texas,
	6-7	Onoff the record. (Off the record)	
	8	JUDGE CARSON:	On
	9	international vice president	International Vice President
	10	president	President
	12	for bargaining	for bargaining for
	13	278, and he then	278. The letter
	14	Local 1015 looks	Local 1015 "looks
	16	"If	If
	23	Mr.	Mr. Jesse
221	2	and 1015	and Local 1015
	3	to Corpus Christi	to Local 278 in Corpus Christi
	4	late but—and when the address	late, and were sent to Weslaco.
			When the address
	7	changed to	from the Company were sent.
	8	that as of the receipt of	that after the Company's receipt of
	15	unit	Unit
	21	that in	that, in
	23	numbers by	numbers. By
	24	fax on Tri-Pak letterhead. All	fax, on Tri-Pak letterhead, all
	25	IBEW 1015	IBEW Local 1015
222	3	informations	information
	5	agreement a	agreement.
	6	nd for the first time, on December	By letter dated December 20,
		20, 2004, an issue	Counsel for the Company raised an
			issue,
	7	raised,	
	9	union.	Union, but
	10	It relates to the fact that Local 278	related to the fact that Local 278 was
		was certified and	certified.
	11	requested that the union	The letter requested that the Union
	12	In formation	Information, Joint Exhibit 14,
	13	sent, and the next document that	sent.
	14	was sent.	

	Page	Line	Delete	Insert
		15-16	Off the record. (Off the record.)	
		17	JUDGE CARSON: The union sent	
5			documentation and on	
		18	January 5, the company	On January 5, 2005, the Company
		21	that had been	that had been stated
		23-24	The company letter, Joint Exhibit	The Company letter of January 5,
			Number 15, that is, the letter of	2005, Joint Exhibit 15, reflects that
10			January 5, reflects that the	the Company wanted
			company wants	
	223	2	it's the company belief	the Company believed
		4	And then on February 7, after	On February 7, after conversation
4.5			conversation and a	and an
15		5	case authority, counsel for the	case authority cited by the Union,
			company	Counsel for the Company
		12	8(5)	Section 8(a)(5)
		14	8(1)	Section 8(a)(1)
20		14	8(2)	8(a)(2)
20		21	union	Unit
		23	Local 1015, and I	Local 1015. I
	224	4	relationship	contract
		5	of course	in his oral argument
25		6	It	Board precedent
		7	notes that	establishes that,
		8	occur during—must issue	occurred
		9	relative to events occurring in the	more than
		16	preceding of	proceeding
30		17	In that case,	In <i>Route 22 Toyota</i> , 337 NLRB 84 (2001)
		20-21	And, you know, too late.	The Board held that the company's
			,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	action came too late.
		22	agreed that the other	
35		23	local, Local 148—the Board	held
			agreed	
		25	That	
	225	1-2	case, the Local 747 case, is Route	
			22 Auto Sales—I believe it might	
40			be cited as Toyota, but I will fix	
			that—337 NLRB 84.	
		7	certification, the	
		15	states	stated
4-		18	knowledge of the Act	knowledge of the act
45		23	ofoff the record.	sent by the Union on
		24	(Off the record,)	
		25	JUDGE CARSON: I can find	
	000	40	nothing clearer than the	T
	226	13	That	This